Filed 7/20/12 In re Clinton S. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

In re CLINTON S., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. CLINTON S., Defendant and Appellant.	C067459 (Super. Ct. No. JD09619)

Following a contested jurisdictional hearing, the juvenile court sustained allegations that the minor, Clinton S., committed a battery with serious bodily injury (Pen. Code, § 243, subd. (d)),[1] assault by means of force likely to produce great bodily injury (*id.*, § 245, subd. (a)(1)) with a true finding he had personally inflicted great bodily injury (*id.*, § 12022.7, subd. (a)), and battery with injury on a school

[1] Undesignated statutory references are to those sections of the Penal Code in effect at the time of the minor's February 1, 2011 disposition and sentencing hearing.

employee (*id.*, § 243.6) with a true finding he had personally inflicted great bodily injury (*id.*, § 12022.7, subd. (a)). The minor appeals the order of the superior court declaring him to be a ward of the juvenile court under Welfare and Institutions Code section 602 contending: (1) there was insufficient evidence that the minor personally inflicted injury; (2) there was insufficient evidence that the minor used force likely to cause great bodily injury; and (3) the juvenile court failed to declare whether the sustained offenses were felonies or misdemeanors. We find the matter must be remanded to the juvenile court for a declaration of whether the battery with serious bodily injury offense is a felony or a misdemeanor. In all other respects, we shall affirm the judgment.

FACTAUL BACKGROUND AND PROCEDURAL HISTORY

Following a food fight in the cafeteria of a high school, fist fights among the students broke out. The school principal, Dr. Stuart MacKay, the noon duty supervisor, Shelley Jordan, and the campus supervisor, Teresa Blackmer, went outside to break up the fights.

MacKay and Jordan saw the minor and Juan G. fighting. MacKay saw the minor punch Juan G. in the jaw with a closed fist. Jordan and Blackmer also saw the minor fighting and throwing punches. It appeared to MacKay the fight was serious because, "when . . . young teenage men are throwing punches, especially at someone's head, it can result in broken jaws; it can result in concussions, and the young men were really trying

to go for each other." MacKay moved between Juan G. and the minor, called for someone to take the minor away and turned to face Juan G. Thinking someone was dealing with the minor, MacKay turned and focused his attention on Juan G. The minor was very upset, sweaty and angry and Jordan tried to calm him down, while MacKay held Juan G. The minor told Jordan she had "better move out of the way." To avoid being hurt, Jordan let the minor go. The minor then punched MacKay on the side of the head with a closed fist. The next thing MacKay could recall was lying on the ground with Juan G.[2] Jordan believed MacKay "took down" Juan G. in an attempt to stop the fight from continuing.

Later in the day, MacKay developed an intense headache and dizziness. He also had sustained slight damage to his left knee and was suffering from pain in his neck. He drove himself to the doctor's office and was found to have sustained a possible concussion. For the next several weeks MacKay was not ambulatory, suffered from neck pain, dizziness, migraines, night sweats, intermittent headaches, disturbed sleep patterns and short-term memory failures. He was off work for almost four months. He took painkillers for several months and continued to take muscle relaxants at the time of trial. Upon his return to work, he could only work part time due to fatigue and neck pain. MacKay did not have any preexisting conditions that would account for these symptoms.

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[2] MacKay testified, "[T]hat's where it gets really fuzzy for me, because . . . apparently, I ended up on the ground."

Juan G. did not identify the minor as the person with whom he had been fighting and described MacKay's assailant as significantly taller than the minor. The minor denied fighting any student during the post-food-fight fracas and denied hitting MacKay. Rather, he claimed he had been watching a fight when he was assaulted, and came upon Jordan and MacKay while he was looking for the students who had attacked him.

A petition was filed under Welfare and Institutions Code section 602, alleging that on October 28, 2009, the minor had committed battery with serious bodily injury (Pen. Code, § 243, subd. (d)—count 1), assault by means of force likely to produce great bodily injury (*id.*, § 245, subd. (a)(1)—count 2), battery with injury to a school employee (*id.*, § 243.6—count 3) and fighting in a public place (*id.*, § 415, subd. (1)—count 4). It was further alleged as to counts 2 and 3 that the minor had personally inflicted great bodily injury. (*Id.*, § 12022.7, subd. (a).)

Following a contested hearing, the court sustained the petition on counts 1 through 3 and found the enhancements true. Count 4 was dismissed as not true. The minor was declared a ward of the court and placed with his family under supervision by probation.

DISCUSSION

I. Sufficiency of Evidence: Personal Infliction of Injuries

The minor contends there is insufficient evidence to support the enhancement allegation that he personally inflicted

the injuries suffered by MacKay. Specifically, the minor argues there is no evidence he caused MacKay's injuries, as there was "no testimony [about] how much force was used [in hitting MacKay], or whether the 'hit' actually caused [MacKay's] injuries." We disagree.

"'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We must "'accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.' [Citation.] 'Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].'" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

"'[T]he statutory term "personally inflict" has a distinct meaning, which is something different than proximate cause. (*People v. Cole* (1982) 31 Cal.3d 568 [(*Cole*)].)' (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 348 [(*Rodriguez*)].)" (*People v. Valenzuela* (2010) 191 Cal.App.4th 316, 321 (*Valenzuela*).) "To 'personally inflict' an injury is to

directly cause an injury, not just to proximately cause it." (*Rodriguez*, *supra*, 69 Cal.App.4th at p. 347.) Under proximate causation principles, even if there are multiple contributing causes of an injury, the defendant is culpable if an intervening cause is a direct, natural and probable consequence of the defendant's act, or if the defendant's act was a substantial factor contributing to the injury along with other concurrent causes. (*People v. Cervantes* (2001) 26 Cal.4th 860, 866–867, 871; *People v. Sanchez* (2001) 26 Cal.4th 834, 845.) But a showing that the defendant proximately caused an injury does not suffice to show that the defendant personally inflicted the injury. (*Valenzuela*, *supra*, 191 Cal.App.4th at p. 321.)

Here, the evidence established the minor punched MacKay in the side of the head with a closed fist, MacKay momentarily became disoriented ("fuzzy") and fell to the ground. Later in the afternoon, MacKay became dizzy, developed an intense headache, and had damage to his left knee and pain on the left side of his neck. MacKay was unable to work for months because of constant headaches, had trouble sleeping, short-term memory failure and night sweats. MacKay sought medical attention on the day of the incident, had no preexisting symptoms or conditions and there were no intervening events that could have caused the symptoms. It is reasonable to infer from the evidence that the minor's punch to MacKay's head was of sufficient force to cause him to "get fuzzy" or disoriented and that the blow directly caused MacKay's injuries.

Contrary to the minor's claim, expert testimony was not required. Nothing beyond common experience is necessary to understand that a closed-fist punch to the head can cause head injuries, including headaches, neck pain, memory loss and dizziness. (See *In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161-1162 (*Nirran W.*); *People v. Chavez* (1968) 268 Cal.App.2d 381, 384.) As a matter within common experience, no expert testimony was needed to show that the minor's punch caused MacKay's injuries.

The authorities the minor relies upon—*Cole*, *Rodriguez*, and *Valenzuela*—are inapposite, as none address the issue of whether the force applied resulted in the injuries sustained. Rather, in each, the issue was whether the defendant had personally and directly performed the act that inflicted the injuries, rather than proximately caused them. In each, the court determined "that a defendant personally inflicts great bodily harm only if there is a direct physical link between his own act and the victim's injury. . . . [S]omeone who does not strike or otherwise personally use force upon the victim does not qualify for enhanced punishment where the personal infliction of harm is required." (*People v. Modiri* (2006) 39 Cal.4th 481, 495.) In *Cole*, acting on the defendant's order, the defendant's accomplice hit the victim in the head with a rifle. The defendant had no physical contact with the victim. (*Cole*, *supra*, 31 Cal.3d at p. 571.) In *Rodriguez*, the officer injured himself when he tried to tackle a fleeing defendant who, before

that moment, had not had any physical contact with the officer. (*Rodriguez*, *supra*, 69 Cal.App.4th at p. 346.) In *Valenzuela*, in the context of proving a prior strike conviction, the defendant's admission he had proximately caused injury by reckless driving did not establish the defendant's volitional act directly caused the victim's injuries. The injuries could have been caused by another driver's volitional act. (*Valenzuela*, *supra*, 191 Cal.App.4th at pp. 322-323.)

By contrast, here, there is evidence the minor personally punched MacKay in the head. From the evidence, it is reasonable to infer that this punch to the head caused MacKay's injuries. Thus, the evidence is sufficient to support the finding that the minor inflicted great bodily injury on MacKay.

II. Sufficiency of Evidence: Assault By Means of Force Likely to Produce Great Bodily Injury

The minor next contends there is insufficient evidence to support the finding that he committed assault by means of force likely to produce great bodily injury. The minor essentially repeats the contentions made above, that there was no evidence establishing "how hard [the minor's] single hit" to MacKay was and no evidence the injuries suffered by MacKay were caused by the minor's punch.

Assault by means of force likely to produce great bodily injury requires the *likelihood* of great bodily injury, not the actual infliction of injury. (*People v. Wingo* (1975) 14 Cal.3d 169, 176; *People v. Muir* (1966) 244 Cal.App.2d 598, 604.) The

issue "'is not whether serious injury was caused, but whether the force used was such as would be likely to cause it.'" (*People v. Covino* (1980) 100 Cal.App.3d 660, 667.) Nonetheless, in this case, as discussed above, there was sufficient evidence that the minor's punch to MacKay's head directly caused his injuries.

Although actual injury is not an element of the offense, "when the evidence shows that a blow has been struck or a physical injury actually inflicted, the nature and extent of the injury is a relevant and often controlling factor in determining whether the force used was of felonious character." (*People v. Wells* (1971) 14 Cal.App.3d 348, 358.) The use of hands or fists alone, including a single blow with a fist to the victim's head, can be sufficient to support a finding that a defendant used force likely to produce great bodily injury. (*Nirran W.*, *supra*, 207 Cal.App.3d at p. 1161; see also *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Nirran W. is instructive. In *Nirran W.*, the victim was unexpectedly struck once in the face with a closed fist by a minor. (*Nirran W.*, *supra*, 207 Cal.App.3d at p. 1159.) She was knocked to the ground and the injuries she sustained caused her to be treated at a hospital for four to five hours. Almost two months after the incident, the victim's teeth still did not meet. (*Id.* at p. 1162.) The court found this was sufficient evidence to establish the minor had "delivered the blow with

sufficient force likely to produce great bodily injury." (*Ibid.*)

Here, as in *Nirran W.*, the victim was unexpectedly hit once in the head with a closed fist by the minor. The blow caused MacKay to "get fuzzy" or disoriented and suffer dizziness and severe headaches. He required medical treatment the day of the assault, and subsequent neurological treatment. For several months after the assault he continued to suffer from short-term memory failure and constant headaches. As in *Nirran W.*, there was substantial evidence that the force of the blow was likely to produce great bodily injury. (*Nirran W.*, *supra*, 207 Cal.App.3d at p. 1162.)

III. Juvenile Court Declaration: Felony or Misdemeanor

The minor contends the case must be remanded because the juvenile court did not declare whether the sustained offenses were felonies or misdemeanors and the record does not indicate the court was aware of, and exercised, its discretion.

Penal Code sections 243, subdivision (d), 245, subdivision (a) and 243.6 are "wobbler" offenses which can, in the case of an adult, be punished either as a felony or a misdemeanor. Under Welfare and Institutions Code section 702, "[i]f the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." This requirement "serves the purpose of ensuring that the juvenile court is aware of, and actually

exercises, its discretion under Welfare and Institutions Code section 702." (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1207 (*Manzy W.*).) Here, the court did not make the required express finding.

"[N]either the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony." (*Manzy W.*, *supra*, 14 Cal.4th at p. 1208.) Furthermore, when the juvenile court violates its duty under Welfare and Institutions Code section 702, it is inappropriate to apply the presumption of Evidence Code section 664 "that the juvenile court performed its official duty." (*Manzy W.*, at p. 1209.) However, a failure to make the formal declaration under Welfare and Institutions Code section 702 does not require "'automatic'" remand. (*Manzy W.*, at p. 1209.) If the record shows "that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler[,] . . . remand would be merely redundant [and] failure to comply with the statute would amount to harmless error. . . . The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit." (*Ibid.*)

As to the findings on counts 2 and 3, under sections 245, subdivision (a)(1) and 243.6, the Attorney General argues the

fact that the juvenile court sustained the finding on the enhancement allegations that the minor inflicted great bodily injury under section 12022.7, subdivision (a), and this enhancement can only attach to a felony offense, necessarily means the juvenile court found both substantive offenses were felonies. We agree.

The minor's argument as to these counts relies on his claim that the true finding on the enhancement allegations was not supported by substantial evidence. As above, it was. By its terms, this enhancement applies only when the infliction of great bodily injury occurs in the commission of a felony or attempted felony. (§ 12022.7, subd. (a).) Accordingly, in finding this allegation true, the court also determined the underlying offenses were felonies.

As to count 1, the battery under section 243, subdivision (d), the Attorney General concedes the record does not reflect a finding as to whether the offense was a felony or a misdemeanor, and must be remanded to allow the juvenile court to exercise its discretion and determine whether the offense should be treated as a felony or a misdemeanor. We agree and accept this properly given concession.

Since the record contains no indication that the juvenile court was aware of its discretion to treat the section 243, subdivision (d) battery as a misdemeanor, remand is required to permit the juvenile court to exercise its discretion to declare the offense a misdemeanor or felony.

DISPOSITION

The matter is remanded to the juvenile court to declare whether the minor's battery with serious bodily injury in count 1 (Pen. Code, § 243, subd. (d)) is a misdemeanor or felony, as required by Welfare and Institutions Code section 702. In all other respects, the jurisdictional and dispositional orders are affirmed.

BUTZ, Acting P. J.

We concur:

MAURO, J.

HOCH, J.